

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 75-7031-55

To be argued by  
ANTHONY F. PHILLIPS

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IN THE  
**United States Court of Appeals**  
For the Second Circuit

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Docket Nos. 75-7031, 75-7055

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HOWARD BERCH,

*Plaintiff-Appellant,*

v.

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY,  
BANQUE ROTHSCHILD, HILL SAMUEL AND CO., LIM-  
ITED, GUINNESS MAHON & CO., LIMITED, PIERSON,  
HELDING & PIERSON, SMITH BARNEY & CO., INCOR-  
PORATED, J. H. CRANG & CO., INVESTORS OVERSEAS  
BANK LIMITED, ARTHUR ANDERSEN & CO., I.O.S., LTD.,  
and BERNARD CORNFELD,

*Defendants,*

and

J. H. CRANG & CO.,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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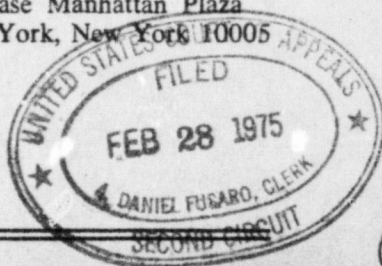
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**BRIEF OF THE DEFENDANT-APPELLEE**  
**J. H. CRANG & CO.**

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6



## TABLE OF CONTENTS

	PAGE
Issues on Appeal .....	2
Statement of the Case .....	3
Preliminary Statement .....	3
The Parties .....	3
The Pleadings .....	5
The Proceedings Below .....	6
Crang's Limited Connection with the United States .....	9
The Canadian Underwriting .....	11
Canadian Regulation of the Canadian Offering ...	15
Sales by Crang Were Made Only Outside the United States to Non-Americans .....	16
Plaintiff Bersch's Purchase of IOS Stock .....	17
The Drexel and IOB Underwritings .....	18

### ARGUMENT:

POINT I—The Courts of the United States cannot exercise <i>in personam</i> jurisdiction over Crang ....	20
A. The District Court Correctly Found That Crang Is Not "Present" or "Doing Business" in the United States .....	21
B. Crang Performed No Acts in the United States Which Subject it to Jurisdiction Here .....	30
C. Plaintiff Has Had Sufficient Discovery on the Jurisdictional Issue .....	33

POINT II—This Court lacks jurisdiction over the subject matter of this action with respect to Crang and over the claims of Canadians who purchased stock from Crang .....	34
A. The Securities Acts Do Not Confer Jurisdiction Over the Claims of Foreigners Who Purchased IOS Stock .....	34
1. International Law Precludes the Application of the United States Securities Laws to the Canadian Underwriting .....	38
2. Crang Performed No Essential Acts in This Country .....	41
B. The Canadian Offering had No Detrimental Impact Within the United States and Does Not Warrant the Extraterritorial Extension of American Securities Laws .....	47
C. Subject Matter Jurisdiction Cannot Be Supported By the Concept of "Integration" Coupled with Aiding and Abetting .....	48
D. The District Court Erroneously Denied Crang's Claim for Section 30(b) Exemption .....	53
CONCLUSION .....	56
CASES CITED:	
Alvarez v. Pan American Life Insurance Co., 357 F.2d 992 (5th Cir. 1967), <i>cert. denied</i> , 387 U.S. 827 (1969) .....	35

	PAGE
Aquascutum of London, Inc. v. S.S. American Champion, 426 F. 2d 205 (2d Cir. 1970) .....	29
Bailey v. Patterson, 369 U.S. 31 (1962) .....	35
Bersch v. Drexel Firestone Inc., et al., [Current] CCH Fed. Sec. L. Rep. ¶ 94,889 at 97,017 (S.D. N.Y. November 27, 1974) .....	2
Bertha Building Corp. v. National Theatres Corp., 248 F.2d 833 (2d Cir. 1957), <i>cert. denied</i> , 356 U.S. 936 (1958) .....	33
Brennan v. Midwestern United Life Insurance Company, 417 F.2d 147, (7th Cir. 1969), <i>cert.</i> <i>denied</i> , 397 U.S. 989 (1970) .....	50, 52
British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd., 1 Ch. 19 (1953) .....	41
Bryant v. Finnish National Airline, 15 N.Y. 2d 426 (1969) .....	22
Buckingham v. Lord, 326 F. Supp. 218 (D.C. Mont. 1971) .....	35
Chris-Craft Industries, Inc. v. Bangor Punta Corp., 480 F.2d 341 (2d Cir.), <i>cert. denied</i> , 414 U.S. 910 (1973) .....	44
Cohn v. Franchard Corp., 478 F.2d 115 (2d Cir. 1973), <i>cert. denied</i> , 414 U.S. 857 (1973) .....	44
Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Inc., 317 F. Supp. 1022 (E.D. Pa. 1970) ..	35
Delagi v. Volkswagen A.G., 29 N.Y. 2d 426 (1970)	28
Dictograph Products Co. v. Sonotone Corporation, 231 F.2d 807 (2d Cir. 1956) .....	23
DeMarco v. Edens, 390 F.2d 836 (2d Cir. 1968) ..	44

	PAGE
Ex Parte Edelstein, 30 F.2d 636 (2d Cir. 1929) . . .	36
Finch v. Marathon Securities Corp., 316 F. Supp. 1345 (S.D.N.Y. 1970) . . . . .	42
Fischer v. Kletz, 266 F. Supp. 180 (S.D.N.Y. 1967)	52
Frummer v. Hilton Hotels International, Inc., 9 N.Y. 2d 533 (1967) . . . . .	31, 32
Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967) . . . . .	35, 36
Hanson v. Denckla, 357 U.S. 235 (1958) . . . . .	7, 20
Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964) . . . . .	35
H. L. Moore Drug Exchange Inc. v. Smith, Kline & French Laboratories, 384 F.2d 97 (2d Cir. 1967)	33
Hochfelder v. Ernst & Ernst [Current] CCH Fed. Sec. L. Rep. ¶ 94,781 (7th Cir. August 30, 1974) at 96,579 . . . . .	51
International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) . . . . .	8, 20-21, 27, 31
Jaconski v. Avison Corporation, 359 F.2d 931 (3d Cir. 1966) . . . . .	23
Kavourgias v. Nickolaou Co., 148 F.2d 96 (9th Cir. 1945) . . . . .	36
Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960)	54
Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973) ( <i>en banc</i> ) . . . . .	50
Lauritzen v. Larsen, 345 U.S. 571 (1953) . . . . .	39
Leasco v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) 8, 21, 26, 27, 29, 31, 33, 41, 42, 43, 44, 45, 47, 48, 49	

	PAGE
East v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1965), <i>cert. denied</i> , 382 U.S. 811 (1965) .....	44
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) .....	39
McGee v. International Life Insurance Company, 355 U.S. 220 (1957) .....	30, 31
Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) .....	25
Rosen v. Dick, et al., [Current] CCH Fed. Sec. L. Rep. ¶ 94,786 (S.D.N.Y., September 3, 1974) at 96,604 .....	50
Sclerk v. Alberto-Culver Co., 417 U.S. 506 (1974) .....	37, 41
Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.) <i>rev'd. on other grounds</i> , 405 F.2d 215 (2d Cir. 1968) <i>en banc</i> , <i>cert. denied sub nom</i> Manley v. Schoenbaum, 395 U.S. 906 (1969) .....	8-9, 41, 54
SEC v. Coffey ['73-'74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,464 (6th Cir. March 28, 1974) at 95,634 .....	50, 52
SEC v. National Bankers Life Insurance Co., 324 F. Supp. 189 (N.J. Tex.) <i>aff'd</i> 448 F.2d 652 (5th Cir. 1971) .....	51, 52
SEC v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973) .....	45, 46
Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197 (1970) .....	33
Simonson v. International Bank, 14 N.Y. 2d 281 (1964) .....	22

	PAGE
Sinva Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 F.R.D. 385 (S.D.N.Y. 1969) ....	55
Smith v. Bear, 237 F.2d 79 (2d Cir. 1956) .....	44
Snyder v. Harris, 394 U.S. 332 (1969) .....	35
Steele v. Bulova Watch Co., 344 U.S. 280 (1952) ..	40
Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917) .....	22, 28
Timetrust, Inc. v. SEC, 142 F.2d 744 (9th Cir. 1944) .....	52
Travis v. Anthes Imperial Limited, 473 F.2d 516 (8th Cir. 1973) .....	44
Tsitsinakis v. Simpson, Spence & Young, 90 F. Supp. 578 (S.D.N.Y. 1950) .....	36
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	36
U.S. v. Aluminum Co. of America, 146 F.2d 416 (2nd Cir. 1945) .....	40
United States v. Clark, 359 F. Supp. 131 (S.D.N.Y. 1973) .....	45, 46
United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) .....	41
U.S. v. Summit Fidelity & Surety Company, 408 F.2d 46 (6th Cir. 1969) .....	23
U.S. v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962) .....	40
Weaver v. United California Bank, No. C-71-1738 SW (N.D. Cal., filed March 29, 1974) ....	37
Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971) ...	52
Zahn v. International Paper Co., 414 U.S. 291 (1973) .....	35, 36

## Statutes Cited

	PAGE
Securities Act of 1933:	
Section 12(2) [15 U.S.C. § 771(2)] .....	5, 42, 44
Section 15 [15 U.S.C. § 77o] .....	5
Section 17(a) [15 U.S.C. § 77q(a)] .....	5, 42, 44
Section 22 [15 U.S.C. § 77v] .....	5
Securities Act of 1934:	
Section 10(b) [15 U.S.C. § 78j(b)] ....	5, 38, 41, 42, 43, 44, 48, 53
Section 15(c)(1) [15 U.S.C. 78o] .....	5
Section 20 [15 U.S.C. 78t] .....	5
Section 27 [15 U.S.C. § 78(aa)] .....	5
Section 30(b) [15 U.S.C. § 78ff(b)] .....	53, 54, 55
Rule 10b-5 [17 C.F.R. § 240-10b-5] .....	5, 43, 44, 52
Rule 15c1-2 [17 C.F.R. § 240.15c1-2] .....	5
N.Y.C.P.L.R. §§ 302(a)(1) and 302(a)(2) (McKin- ney 1972) .....	31
Winding-up Act of Canada, Revised Statutes of Canada 1970, Ch. W-10, as amended .....	5

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Restatement (Second) Conflict of Laws § 35 (1969) 20, 21-22, 25, 28, 30, 31	
Restatement (Second) Conflict of Laws § 36 (1969) ..	20, 31
Restatement (Second) Conflict of Laws § 47 (1969) ..	7
Restatement (Second) Conflict of Laws § 49 (1969) ..	7
Restatement (Second) Conflict of Laws § 50 (1969) ..	7
Restatement (Second) Conflict of Laws § 148 (1971) ..	45
Restatement (Second) of the Foreign Relations Law of the United States § 17 (1965) .....	42
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Restatement of Torts § 876 (1939) .....	50

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HOWARD BERSCH,

*Plaintiff-Appellant,*

v.

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE  
ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS  
MAHON & CO., LIMITED, PIERSON, HELDRING & PIERSON,  
SMITH BARNEY & CO., INCORPORATED, J. H. CRANG & CO.,  
INVESTORS OVERSEAS BANK LIMITED, ARTHUR ANDERSEN &  
CO., I.O.S., LTD., and BERNARD CORNFELD,

*Defendants,*

*and*

J. H. CRANG & Co.,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF THE DEFENDANT-APPELLEE**  
**J. H. CRANG & CO.**

Plaintiff Howard Bersch ("Bersch") appeals from an  
order of the United States District Court for the Southern  
District of New York, per the Honorable Robert L. Carter,

granting the motion of J. H. Crang & Co. ("Crang") to dismiss the complaint for lack of personal jurisdiction. Judge Carter's opinion is reported in *Bersch v. Drexel Firestone, Inc., et al.*, [Current] CCH Fed. Sec. L. Rep. ¶ 94,889 at 97,017 *et seq.* (S.D.N.Y. November 27, 1974). By order dated February 3, 1975, this appeal was consolidated with the appeal by defendant Arthur Andersen & Co. ("Andersen") pursuant to 28 U.S.C. § 1292(b) (1966) from the order of the District Court dated November 27, 1974 denying its motion to dismiss the complaint for lack of subject matter jurisdiction.

### Issues on Appeal

1. Does the District Court have *in personam* jurisdiction under the securities laws over a foreign broker dealer which does not "do business" in the United States, performed no acts in the United States giving rise to plaintiff's cause of action, nor performed acts outside the United States having significant and foreseeable effects in the United States.

2. Does the District Court have subject matter jurisdiction under the securities laws over the claims of Canadians who purchased securities of a Canadian issuer from a Canadian underwriter, which securities were not listed or traded in the United States, and over a Canadian broker dealer who sold such securities exclusively to Canadians in Canada in an underwriting which was fully regulated by the securities commissions in Canada, where no fraudulent representations were made in this country and no other wrongful conduct was committed here.

## Statement of the Case

### Preliminary Statement

This is a class action for fraud and alleged misrepresentations in connection with three separate foreign underwritings in September 1969 of securities of I.O.S., Ltd. ("IOS"), a Canadian corporation. The significant facts and circumstances took place outside the United States and most of the principal parties are foreigners. The complaint alleges, in substance, that the prospectuses pursuant to which each of the offerings was made were false and misleading in that they failed to reveal material facts concerning IOS's finances and management, all in violation of the securities laws of the United States.

### The Parties

Plaintiff Bersch, a United States citizen and resident, was an IOS insider who purchased 600 shares of common stock of IOS in September 1969. (5A-6A).<sup>\*</sup> Class members potentially consist of 100,000 persons falling into three classes: (i) foreigners residing outside the United States who purchased IOS shares abroad, and who constitute more than 99% of the class; (ii) a small group of nonresidents of the United States who were IOS insiders and who purchased their shares outside the United States; and (iii) plaintiff and a handful of unidentified resident United States citizens who were IOS insiders who purchased IOS stock in the United States. (6A, 7A, 73A-80A).

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<sup>\*</sup> References bearing the suffix letter "A" are to the pages of the joint appendix filed in the consolidated appeal of defendant Andersen, Docket No. 75-7055; references bearing the suffix "PA" are to the plaintiff's appendix in the appeal herein, Docket No. 75-7031; and references bearing the suffix letter "CA" are to the pages of the Crang appendix. The references to "Br." are to the plaintiff-appellant's brief on personal jurisdiction, Docket No. 75-7031.

4

Defendants Drexel Firestone, Inc. and Smith, Barney & Co., Incorporated are United States broker dealers. (55A, 113A). They and four other foreign underwriting houses, defendants Banque Rothschild, Hill Samuel & Co., Limited, Guinness Mahon & Co., Limited, and Pierson, Heldring & Pierson (the "Drexel Group") were the managing underwriters in a primary offering of 5,600,000 shares of common stock issued by IOS pursuant to prospectus dated September 24, 1969; those shares were sold exclusively to clients residing in Europe, Asia and Australia—no shares were sold to anyone in the United States or to United States citizens anywhere. (55A-60A, 113A-119A).

Defendant Crang was a Canadian brokerage firm which, together with an underwriting group composed of Canadian firms, underwrote and sold 1,450,000 shares of IOS common stock to foreigners pursuant to a separate prospectus dated September 24, 1969; the underwriting was limited to Canada and thus was duly registered with and regulated by the ten Canadian provincial securities commissions and the Canadian federal securities commission. (63A-71A, 382PA).

Defendant Investors Overseas Bank of the Bahamas ("IOB"), a foreign corporation, underwrote 3,950,000 shares of IOS common stock pursuant to its own prospectus, also dated September 24, 1969. (76A). Those shares were sold almost exclusively to nonresident aliens who were either (i) employees or sales associates of IOS, (ii) certain IOS clients then holding investments in funds managed by IOS, or (iii) persons having long-standing professional or business relationships with IOS. (77A). IOB also offered shares to nonresident United States citizens who were IOS employees or employees of its affiliated companies. (79A). Of those, eleven purchasers have been identified as United States residents. (73A-74A).

Defendant IOS, organized as a Panamanian corporation in 1960 and reconstituted as a Canadian corporation in June 1969, was an international sales and financial services organization engaged in the sale and management of mutual funds and other financial services. (56A). IOS is now in liquidation in New Brunswick, Canada pursuant to the Winding-up Act of Canada, Revised Statutes of Canada 1970, Ch. W-10, as amended. (302A-305A, 378A-379A).

Defendant Andersen is an "international accounting firm" which maintained an office in New York City. (252A). It investigated and certified the IOS financial statements contained in each of the three prospectuses. (101A-102A).

Defendant Bernard Cornfeld, a United States citizen, was an officer, chairman of the Board of Directors and largest shareholder of IOS at the time of the three IOS public offerings. (252A).

### **The Pleadings**

The complaint charges defendants with violations of Sections 12(2), 15 and 17(a) of the Securities Act of 1933 [15 U.S.C. §§ 77l(2), 77o and 77q(a)] ("the Securities Act"), Sections 10(b), 15(c)(1) and 20 of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78j(b), 78o and 78t] ("the Exchange Act") and Rules 10b-5 (17 C.F.R. § 240.10b-5) and 15c1-2 (17 C.F.R. § 240.15c1-2) promulgated thereunder in connection with their participation in the tripartite offering of IOS securities in September 1969. The District Court characterized the complaint as alleging that the prospectuses "were false and misleading in that they failed to reveal material facts concerning I.O.S.'s finances, illegal activities, chaotic bookkeeping and mismanagement, and the actual looting and plundering of I.O.S.'s treasury." (252A). Jurisdiction is claimed pursuant to Section 22 of the Securities Act [15 U.S.C. § 77(v)] and Section 27 of the Exchange Act [15 U.S.C. § 78(aa)].

Each of the defendants served with the complaint has answered and asserted several affirmative defenses, including, *inter alia*, that the District Court lacked jurisdiction over the subject matter of this action. Certain defendants, including Crang, alleged that this Court lacked *in personam* jurisdiction as to them.

#### The Proceedings Below

Upon the motion of plaintiff for a Rule 23(c) order for class action determination, the Honorable Judge Marvin E. Frankel, U.S.D.J. Southern District of New York, ruled on June 28, 1972 that this case could proceed temporarily as a class action on behalf of all purchasers of IOS stock in the three underwritings. (82A-83A). He noted that this motion was presented to him shortly before implementation of the policy of assignment of cases to a single judge for all purposes and that he, therefore, left all problems of class management, including the ultimate determination of the class, to the judge to whom the case was assigned. (84A).

By letter agreement between plaintiff and Crang dated November 10, 1972 and by order dated December 27, 1974 and entered on consent, it was agreed that plaintiff's discovery would be limited to the issues of personal jurisdiction, subject matter jurisdiction and determination of class members. (85A-92A, 7CA-9CA). Plaintiff further agreed to notify defendants when that discovery was completed and, thereupon, the defendants would make whatever jurisdictional and class action motions they chose.\*

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\* Plaintiff's suggestion that he now need only make a "threshold" showing of jurisdictional facts (Br. 28-29) is belied by his prior agreement to conclude discovery pertaining to jurisdiction before the pending motions were filed.

Upon receipt of that notice, Crang and the other defendants moved on October 31, 1973 to dismiss the complaint for lack of subject matter jurisdiction and to limit the class to citizens of the United States who purchased IOS stock in the foreign offerings. (94A, 110A, 150A, 159A, 192A-1). Crang also moved to dismiss the complaint for lack of personal jurisdiction over it and on grounds of *forum non conveniens*. Defendants IOS and Cornfeld also moved to dismiss for lack of personal jurisdiction over them (192A-1, 192A-64) and IOS requested a stay of proceedings as to it until liquidation proceedings in Canada have been completed. (300A).

On November 27, 1974, Judge Carter, in a comprehensive opinion containing extensive findings of fact, denied all the defendants' motions to dismiss on the ground of lack of subject matter jurisdiction and granted Crang's motion to dismiss for lack of personal jurisdiction. (252A-280A). On December 4, 1974, the Clerk entered judgment dismissing the complaint as to Crang.

In brief, the District Court concluded that Crang was neither "present" nor "doing business" in the United States "so as to establish personal jurisdiction." (272A). Citing *Hanson v. Denckla*, 357 U.S. 235 (1958) and the Restatement (Second) of Conflict of Laws § 47 (1969), Judge Carter ruled that:

"[Crang cannot] be said to have engaged in a systematic and continuous activity within the United States, invoking the benefits and protections of its laws." (272A).

Next Judge Carter applied the tests of Restatement (Second) of Conflict of Laws §§ 49 and 50 (1969) cited in

*Leasco v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) and held that:

"Even under the lesser standard of committing acts within the forum rather than engaging in systematic activity, Crang cannot be deemed to have satisfied *in personam* jurisdictional threshold requisites. The only acts of Crang within the United States related to the transaction in question appear to have been the breakfast meetings between Howe and Cowett. These *de minimis* preliminary discussions can hardly be considered acts out of which the cause of action arose. *cf. International Shoe, supra.*" (273A).

Concluding his discussion of personal jurisdiction by applying the "second half of the jurisdictional test articulated by this Circuit in *Leasco*," namely—whether Crang's acts outside the United States sufficiently caused consequences here—Judge Carter found:

"... where Crang did not sell IOS shares to any American citizen, took precautions to prevent and placed restrictions on the sales to Americans, and understood that all other parties to the offering would observe similar restrictions. . . . I cannot reasonably conclude that the conduct of Crang abroad justifies or permits the exercise by this court of personal jurisdiction over it." (274A-275A).

Accordingly, the District Court dismissed Crang from the action.

As to all defendants, Judge Carter ruled that subject matter jurisdiction existed over the claims of all purchasers in all three offerings based on his reading of *Leasco v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) and *Schoen-*

*baum v. Firstbrook*, 405 F.2d 200 (2d Cir.) *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied sub nom, Manley v. Schoenbaum*, 395 U.S. 906 (1969). The Court found "significant conduct" in the United States in that there were purchases by American investors (268A-269A); that the "three offerings were sufficiently integrated and intertwined so as to appropriately be considered a unified transaction" (256A); and that various acts within the United States with respect to the Drexel underwriting, when viewed *in toto*, amounted to significant conduct in the United States. (267A).

#### **Crang's Limited Connection with the United States**

Crang was a Canadian brokerage house. (63A, 272A). The District Court concluded and the record shows that Crang was not "doing business" in the United States based on the facts that it had "no office, bank accounts, telephone listings, subsidiaries or affiliates in the United States. Nor did it have salesmen in the United States." (63A-64A, 153A, 272A, 2CA).

From time to time, and in each instance upon the request of its customers, Crang requested United States brokerage houses to purchase or sell securities in the United States. (64A, 154A). These transactions were insignificant in their total amount. (64A, 154A, 15PA-18PA). Since Crang assisted in the transactions solely for the accommodation of its customers, it never charged or received a commission on any of these transactions. (64A, 154A).\*

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\* Plaintiff cites the record at 15PA-18PA to support his contention that Crang earned commissions on business in the United States totalling approximately \$50,000. The inaccuracy of this statement and the erroneous citation to the record are demonstrated in the argument on pages 28-29, *infra*.

Moreover, Crang was not a member of any United States securities exchange nor was it acting as a broker dealer in the United States at the time of the September 1969 IOS offerings or at the time this suit was initiated in late 1971. (64A, 2CA).<sup>\*</sup> Although Crang was once registered with the SEC in 1956 because of a former affiliation with Grace Canadian Securities, Inc. in New York, notice of terminating that affiliation was given in January 1969 effective on April 1, 1969—over five months prior to the Canadian underwriting of IOS stock. (2CA). As the letter from Crang's counsel indicates, (2CA), Crang did not transact business over a national exchange or otherwise in the United States after 1968. In fact, Crang was requested to withdraw from the National Association of Securities Dealers, Inc. ("NASD") because it no longer had an office in the United States. (2CA). On April 1, 1970, Crang was in effect dissolved and a corporation called J. H. Crang & Co. Limited was formed. (348 PA-349 PA). It was this successor company and not Crang that filed for registration as a broker dealer with the Securities and Exchange Commission ("SEC") in September 1970.<sup>\*\*</sup>

In 1969 and thereafter, as the District Court found, neither Crang nor J. H. Crang & Co. Limited offered or sold securities in the United States, nor did either company solicit offers to buy or sell securities in the United States in the ordinary course of business. (64A, 153A). Moreover, even in connection with the disputed underwriting, Crang

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<sup>\*</sup> A discussion of plaintiff's untimely proffer of "new evidence" of registration documents allegedly pertaining to J. H. Crang & Co. is contained *infra* at pages 23-27. Since plaintiff has chosen to selectively present only that part of the registration file favorable to his case, Crang has submitted its own "addendum" as part of its appendix to demonstrate the inaccuracy of plaintiff's factual representations. See 1CA-6CA.

<sup>\*\*</sup> On June 1, 1972, the name of J. H. Crang & Co. Limited was changed to J. H. Holdings, Limited. (348 PA-349 PA).

did not solicit sales or purchase securities in the United States. (157A). Contrary to plaintiff's assertion that the challenged transaction involved the sale by Crang of IOS shares owned by Americans residing in the United States (Br. 20), the sellers were European residents who authorized the sales abroad and received the proceeds of the sales in Europe. (157A, 346PA-347PA).

### **The Canadian Underwriting**

The District Court determined that Crang's acts in the United States in connection with the Canadian underwriting were of a *de minimis* nature and not "related to the alleged misleading statements and omissions in the prospectuses." (273A). Judge Carter also found that no American citizen or resident purchased any shares in the Crang offering and that Crang took precautions to prevent sales to Americans by appropriate restrictions "and understood that all other parties to the offering would observe similar restrictions." (274A).

The record reflects that as the IOS public offering took shape, Crang's participation was limited to acts outside the United States. In early April 1969, Murray J. Howe ("Howe"), a Crang partner, was first informed, either by telephone between Toronto, Canada and Geneva, Switzerland or at a meeting in Geneva, that IOS was considering a public offering of its shares and was asked if Crang would consider underwriting a portion of the shares to be sold by the selling shareholders. (351PA, 64A). After numerous meetings in Geneva, Toronto, Montreal and London with representatives of IOS, and its counsel, and after numerous letters and telephone calls between Toronto and Geneva (62PA, 119PA, 163PA, 352PA, 353PA, 357PA, 358PA, 361PA, 365PA-367PA), the Canadian underwriting was

structured and an underwriting agreement dated September 23, 1969 was signed in Geneva. (65A).

As to Crang's investigation of IOS, the propriety of which is the subject of this lawsuit, the District Court determined that it was done entirely outside the United States. (273A, 62PA, 351PA, 353PA, 357PA, 358PA, 361PA, 365PA-367PA). Howe visited Geneva "off and on" throughout the month of August 1969 (367PA) and there, Howe and Crang's counsel met with counsel to IOS, with European representatives of Andersen, and with various officers of different divisions of IOS to negotiate the underwriting participation and to obtain information for prospectus purposes. (353PA). Howe also met with representatives of IOS during the summer of 1969 in Toronto and Montreal and there and on several other occasions discussed "the Canadian underwriting." (365PA, 366PA).

Of the numerous meetings between Crang and a representative of IOS management during the relevant period, only two occurred in the United States. (359PA-364PA). Each was for breakfast and lasted approximately one hour. (10CA). The content of the prospectus was not discussed at either meeting; on both occasions the proposed IOS underwriting was a topic of secondary importance. (62PA).

Howe met Cowett of IOS in late April in New York in order to discuss the dividend policy of Investors Overseas Services Limited Management Corp. ("ISM"), an affiliate of IOS whose shares were listed on the Toronto Stock Exchange. (63PA). Both Howe and Cowett served on the board of directors of ISM. At this one hour meeting, an hour which included eating breakfast (10CA), Howe and Cowett continued their prior discussions concerning "the general concept of the underwriting," possible share allotments and dividend policy. (63PA, 119PA, 370PA).

In July 1969, there was a second breakfast meeting in New York between Howe and Cowett for the purpose of discussing the same dividend of ISM. (359PA, 360PA, 365PA). The meeting lasted from three-quarters of an hour to an hour. (364PA). At some point in the discussion, Howe may have referred to Crang's Canadian prospectus (362PA), but he did not bring a draft with him to New York. (*Id.*). As it turned out, the draft prospectus was not completed until late August, after Howe's numerous trips to Geneva. (163PA). The preliminary nature of the two meetings is evidenced by the uncertainty concerning the structure of the underwriting and by the absence of any discussion concerning a market price for the stock. (370PA).

The record shows and the District Court found that Crang prepared the prospectus in Canada, Switzerland and France. (273A). Not a single act relating to the preparation of the Crang prospectus or the sale of securities thereunder was performed in the United States. (68A, 69A, 156A *et seq.*). Specifically, no American law firm prepared, drafted or assisted in the preparation of the Canadian prospectus pursuant to which the underwriting group headed by Crang sold the IOS shares in Canada. (358PA, 67A, 68A). In fact, the Canadian prospectus was prepared by Crang's attorneys in Toronto, Zimmerman & Winters, who discussed it with IOS representatives in Geneva. (36PA, 156A, 157A). Crang never hired any American attorney or accountant. (350PA).\*

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\* Indeed, the only contacts with an American lawyer concerning the prospectus were two telephone calls from Shearman & Sterling to Crang's attorneys in Toronto. The first is not recalled by Crang (380PA), but Grayson M. P. Murphy of Shearman & Sterling testified that he called Crang to pass on the advice of the SEC that a prospectus offering securities to some American citizens might fall within

In addition, the United States mails and other means of interstate commerce were not employed to prepare the only prospectus with which Crang was associated—the Canadian prospectus. Crang never brought or mailed a draft prospectus to anyone in the United States. (362PA-364PA). In accordance with Canadian law, each prospectus was numbered and accounted for. (363PA). The only Canadian prospectuses sent to the United States were stamped “For Information Only” and were not sent until after the underwriting was completed, and then only to brokerage houses who requested them. (70A).

Crang never participated in the preparation of the prospectus offering IOS shares by the Drexel group or by IOB. Only once did Crang even meet an individual from Drexel. In Geneva, Howe and a Drexel individual were in each other’s “presence” for twenty minutes and generally discussed “the investment business.” (345PA). Similarly, Howe met once in Geneva, for a period of three and one-half minutes, with a representative of Shearman & Sterling. (355PA).

The separateness of the Crang underwriting from the Drexel and IOB offerings is manifest in the differences among the offering prospectuses. The Crang prospectus

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the anti-fraud provisions of the securities laws. (11CA). This unsolicited advice did not apply and was of no concern to Crang as it was offering IOS shares only to non-United States residents.

The second telephone call, also initiated by Mr. Murphy, concerned “something to do with a pass-over of the prospectus in connection with the primary offering, which was then verified with our own securities commission and we were told by them to ignore it.” (356PA, 157A). In compliance with the instructions of the Canadian authorities, Crang did not attach a sticker or “pass-over” to the Canadian prospectus. Other than the isolated instances of Mr. Murphy’s unsolicited and gratuitous telephone calls, neither Crang nor its attorneys ever discussed the language of the Canadian prospectus with an American firm of attorneys. (156A *passim*).

was drafted by its Canadian attorneys in compliance with the unique requirements of the Canadian securities commissions. (65A, 156A-158A, 368PA, 369PA). In addition, Crang, unlike the Drexel group, did not employ Price Waterhouse & Co. to investigate IOS.\* The final Canadian prospectus was printed by Atwell Fleming, Toronto, Canada and the share certificates were printed by the Canadian Bank Note Company. (381PA).

### **Canadian Regulation of the Canadian Offering**

The Crang prospectus was drafted to conform to and satisfy the requirements of Canadian securities laws and regulations. Crang had been informed by the Canadian commissions that they had exclusive regulatory jurisdiction:

“[T]he position of the regulatory bodies in Canada, that it was a Canadian underwriting, had nothing to do with anything that may or may not be done by the SEC, outside the jurisdiction of the Canadian regulatory bodies.” (379PA).

Each of the ten provincial securities commissions in Canada and the Canadian federal securities commission reviewed the prospectus in its initial and final forms and each of them cleared the underwriting after review of the prospectus. (69A, 156A-158A, 368PA, 369PA, 382PA). Registration with those commissions involved numerous hours answering the detailed questions posed by Canadian commissioners and, in many cases, changing the Crang prospectus to comply with their interpretation of the applicable regulations. (157A, 158A).

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\* Howe's reaction to being shown documents concerning the work of Price Waterhouse & Co. can only be characterized as surprise. (376PA-378PA). He even inquired of plaintiff's attorney what the documents related to. (*Id.*).

**Sales by Crang Were Made Only Outside the  
United States to Non-Americans**

The District Court held that none of the 1,450,000 IOS shares in the Crang offering were sold to Americans. (268A, 274A). There is no testimony or evidence in the record that any American citizen or resident purchased shares in the Canadian underwriting headed by Crang. (66A, 69A, 71A, 158A). Further, a check of the addresses of each of the purchasers from Crang reveals that none were American addresses. (384PA, 158A-1 *passim*).

The District Court also determined that Crang "took precautions to prevent and placed restrictions on the sales to Americans, and understood that all other parties to the offering would observe similar restrictions." (274A). Paragraph 4(d) of the underwriting agreement between Crang and the selling shareholders expressly provided that Crang would use its best efforts not to sell shares to United States citizens or residents. (252PA-273PA). Throughout the late spring, summer and fall of 1969, Crang received inquiries from Americans and other non-Canadians as to whether they could purchase IOS shares in the Crang underwriting. In each instance, Crang replied that it would not sell IOS shares to Americans or to other non-Canadians. (65A, 275PA-302PA).

In conjunction with the underwriting agreement, Crang entered into a banking group agreement with several Canadian investment firms (the "banking group agreement"). (312PA-319PA, 320PA-327PA). The banking group, unique in Canada, was to sell shares primarily in Canada and not in the United States or to American citizens or residents or to employees of IOS or its affiliated companies. (66A-67A). To insure compliance with the banking group agreement, Crang required each member of the banking

group to warrant after the completion of the underwriting that it had no knowledge that it sold any shares to American citizens or residents, and each did so. (68A, 1PA-14PA). Crang itself repeatedly informed each of its employees of the restrictions on sales and set up a top level screening process for checking residences to prevent sales from being made to United States citizens or residents. (67A, 69A-70A, 161PA, 240A-243A).

In addition to the banking group agreement, Crang entered into a sub-underwriting agreement with IOS and IOB whereby Crang would purchase from IOB 150,000 shares and sell them in Canada to Canadian executives and sales personnel of IOS and its subsidiaries, Canadian investors in mutual funds managed by IOS and long-term Canadian clients of IOS, all as designated by IOS. (303PA-311PA). No shares were to be sold to United States citizens or residents.

These prophylactic internal policies as well as the agreements entered into with the other underwriters were designed to prevent the sale of IOS securities in the Crang offering to Americans and proved to be successful. The record shows and the District Court held that no American purchased shares in the Canadian underwriting headed by Crang and, as noted, each member of the Canadian underwriting group warranted that it had made no sales to Americans. (67A, 1PA-14PA).

#### **Plaintiff Bersch's Purchase of IOS Stock**

Plaintiff Bersch purchased IOS shares only in the IOB underwriting and *not from Crang*. (47A-1, 256A, 268A, 274A). Bersch purchased the IOS shares by completing a form (47A-1) and sending a check payable to a foreign bank, IOB, to Geneva, Switzerland. (47A-1). Moreover, as shown on the form he completed, Bersch made his decision

to purchase shares and paid for them on September 3, 1969. (47A-1). In his answers to interrogatories, Bersch claims to have read the Drexel prospectus, the Crang prospectus and the IOB prospectus "prior to completing my purchase of IOS common stock." (46A). The District Court, however, rejected plaintiff's claim of reliance on the Crang prospectus:

"... plaintiff's purchase of I.O.S. shares does not appear to have been made in reliance on statements in the Crang prospectus, since that prospectus was sent to the United States after the date of the purchase." (273A)

The record shows that the Canadian underwriting commenced on September 24, 1969, some twenty-one days after Bersch decided to purchase. Crang did not send a prospectus or a draft prospectus to the United States until after the Canadian underwriting was completed on October 15, 1969. (363PA). Such prospectuses were stamped "For Information Only" and sent only to brokerage houses who requested them for informational purposes. (70A, 363PA). If Bersch somehow managed to read a copy of the Canadian prospectus before mailing his check to Geneva, his reliance upon it is suspect since the prospectus, on its front page, stated that it offered shares only in Canada and clearly was not addressed as a selling document to Bersch in the United States.

#### **The Drexel and IOB Underwritings**

The Drexel underwriting involved sales of 5,600,000 shares of IOS stock in an underwriting which was conceived, negotiated and consummated primarily abroad. (168A, 175A). The prospectus was prepared exclusively,

with the possible exception of a last minute sticker in Europe. (68A, 69A). No sales were made to Americans. (57A, 59A, 114A-117A, 168A, 177A, 268A).

The Drexel and IOB offerings are fully discussed by defendants Andersen, Cornfeld and IOS in their appellate briefs. Crang had no involvement with the Drexel offering in the United States; it did not attend meetings with the Drexel Group or Andersen in New York nor did it hire Price Waterhouse. (354PA, 376PA-378PA). Crang's only contact with Andersen occurred in Geneva where it met two or three times with a representative of Arthur Andersen's Paris or London office. (353PA). Crang never discussed the Canadian prospectus or the Drexel prospectus with IOS's attorneys, Drexel's counsel or any member of the Drexel group in New York or in the United States. (350PA, 358PA). Drexel's United States activities, as shown by the testimony of Drexel's Bertram Coleman and Grayson M. P. Murphy, its counsel, consisted of introductory meetings before Drexel agreed to do its underwriting, an inquiry of the SEC and last minute meetings concerning the sticker annexed to the Drexel prospectus\*—none of which Crang participated in.

Unlike the Drexel and Crang offerings, IOS shares offered pursuant to the IOB prospectus were available only to employees of IOS and its affiliated companies and to long time clients of IOS. Crang had no involvement with the IOB offering (12CA, 157A) nor with any sale by IOB to plaintiff or to any other American employee of IOS. Crang was not involved in the preparation of any prospectus save its own.

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\* The complaint makes no claim that the sticker was misleading and in fact the Crang prospectus did not have such a sticker as Crang was instructed by Canadian securities commissions not to affix one. (379PA).

## ARGUMENT

### POINT I

**The courts of the United States cannot exercise *in personam* jurisdiction over Crang.**

The District Court correctly reaffirmed the rule that while the principles governing subject matter and personal jurisdiction may be similar, "they are not identical or co-extensive." (271A). Despite plaintiff's efforts to gloss over the distinctions among the various defendants, Judge Carter emphasized that "each party's connection with the forum [must] be individually assessed" and a "more stringent standard applied" in "the context of personal jurisdiction." (271A, 275A).

Plaintiff relies on two bases for exercising jurisdiction over Crang (Br. 10): (1) doing business in the United States and (2) the performance of acts here related to his cause of action. Crang submits that application of either of these tests shows that plaintiff has failed to set forth a sufficient factual basis for the assertion of personal jurisdiction over it. Moreover, the legal standards propounded by plaintiff are faulty. In applying the "doing business" test, plaintiff ignores the rule that this jurisdictional basis requires that the foreign defendant be continuously and permanently present in a state for the state to exercise *in personam* jurisdiction. He also fails to show that his cause of action arose from those few *de minimis* acts Crang performed here.

These well established standards were articulated in *Hanson v. Denckla*, 357 U.S. 235 (1958) and *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), and are codified in the Restatement (Second) of Conflict of Laws §§ 35 and 36 (1969). The Court in *International Shoe Co. v. State of Washington*, *supra*, stated:

"Presence in the state in this sense has been doubted when the activities of the corporation there

have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. [Citations omitted] Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. [Citations omitted] To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process." 326 U.S. at 317.

The application of these standards to the facts relating to Crang is supportive of the District Court's determination that it would violate due process to sustain personal jurisdiction over Crang.

**A. The District Court Correctly Found That Crang Is Not "Present" or "Doing Business" in the United States.**

Section 35 of the Restatement (Second) of Conflict of Laws (1969)\* sets forth the tests for "doing business." It provides:

"(1) A state has power to exercise judicial jurisdiction over an individual who does business in the state with respect to *causes of action arising from the business done in the state.*

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\* This Court in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972), held that the tests stated in the Restatement mark the limits of personal jurisdiction under due process.

(2) A state has power to exercise judicial jurisdiction over an individual who has done business in the state, *but has ceased to do business there at the time when the action is brought, with respect to causes of action arising from the business done in the state.*

(3) A state has power to exercise judicial jurisdiction over an individual who does business in the state *with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.*" (emphasis added).

Since plaintiff does not contend that his cause of action arose out of Crang's alleged business activities within the United States, he should show that the *de minimis* contacts of Crang meet the "continuous and substantial" standard articulated by the Restatement, *supra*. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917) (Cardozo, J.) held that business contacts must constitute "a fair measure of permanence and continuity" with this forum in order to find jurisdiction over a foreign company. The earmarks of permanence are indicia of physical presence. An office, employees performing services for the corporation, a telephone listing, and stationery indicating the corporation has an address in New York have been held to be the earmarks of continued presence. *See, e.g., Bryant v. Finnish National Airline*, 15 N.Y. 2d 426 (1969). Absent offices or other facilities in this state, a foreign corporation does not do business here. *Simonson v. International Bank*, 14 N.Y. 2d 281 (1964).

Plaintiff makes four points in support of his "doing business" theory: (1) Crang was "registered" with the

SEC as a broker dealer in the United States (Br. 13); (2) Howe, a Crang partner, made "four or five" trips to the United States in 1969 allegedly to "drum up business" for Crang (Br. 17); (3) Crang carried on a business with United States securities customers (Br. 17); and (4) some of the sellers of IOS stock in the Canadian underwriting were United States residents. (Br. 20).

Plaintiff's first contention that Crang was registered with the SEC is spun out of an untimely and misleading submission of "new evidence." This unauthorized submission violates the well-settled principle that federal appellate courts consider only the facts in evidence below. For this reason alone, the plaintiff's addendum should be ignored. As this Court has recognized, there is no appellate jurisdiction to consider any evidence which was not filed with the District Court when Judge Carter decided the motions. *Dictograph Products Co. v. Sonotone Corp.*, 231 F.2d 807 (2d Cir. 1956); *Jaconski v. Avison Corp.*, 359 F.2d 931 (3rd Cir. 1966); *United States v. Summit Fidelity & Surety Co.*, 408 F.2d 46 (6th Cir. 1969).

To make it worse, plaintiff compounds his cavalier disregard of settled principles of appellate review by making an incomplete selection of documents from the SEC file and misinterpreting the limited documents he chooses to present. *Form BD Under The Securities Act of 1934* ("Form BD") in plaintiff's addendum shows that Crang applied for registration as a broker dealer with the SEC on May 15, 1956 and that the registration became effective June 5, 1956. The second set of documents in plaintiff's addendum (the "1970 Registration Form") shows that the successor company to Crang, J. H. Crang & Co. Limited, applied to register with the SEC as a broker dealer on September 17, 1970 and consented to the designation of the

SEC as agent for service of process at that time.\* These documents do not tell the whole story.

First, it is misleading to produce Form BD while withholding a letter from Crang's counsel to the SEC which sets forth in detail the facts pertaining to the registration of Crang and its successor companies with the SEC. (1CA-6CA). That letter demonstrates that Crang's former branch office in New York was going out of business by 1968 and, in fact, was closed effective April 1, 1969. (2CA). Thereafter, Crang was requested by the NASD to withdraw from membership because it no longer had an office in the United States. The record shows that at the time of the public offering, Crang had closed its branch office in New York and was no longer acting as a broker dealer in the United States (2CA), had allowed its 1956 SEC registration to lapse and had formally withdrawn from the NASD. (2CA).

Second, the 1970 Registration Form is made out to an entirely different company, namely, J. H. Crang & Co. Limited.\*\* The defendant here is a partnership named J. H. Crang & Co. whose business was dissolved in April 1970. Plaintiff cannot succeed in obtaining jurisdiction over Crang by reference to the acts of its successor company.

Disputes over the genealogy of these registration statements aside, however, a lapsed registration hardly constitutes "business so continuous and substantial as to make it reasonable for the State to exercise [personal] jurisdiction

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\* Plaintiff has never even attempted to serve either J. H. Crang & Co. Limited or J. H. Crang & Co. through the SEC, nor has he served J. H. Crang & Co. Limited by mail.

\*\* The SEC permitted that registration to be withdrawn in April 1972.

tion." Restatement (Second) of Conflict of Laws § 35(3) (1969). Indeed, even the existence of a valid, unexpired registration is not enough of a nexus to support a finding of *in personam* jurisdiction. The Supreme Court observed in an analogous situation that even the existence of a fully effective license under a defendant foreign corporation's name would not, without more, be enough to subject the party to *in personam* jurisdiction:

"The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test. For example, the state of the forum may by statute require a foreign mining corporation to secure a license in order lawfully to carry on there such functional intrastate operations as those of mining or refining ore." *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952).

The Court's focus continued to be on the traditional indicia of the "doing business" basis of jurisdiction:

"On the other hand, if the same corporation carries on, in that state, other continuous and systematic corporate activities as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings *in personam* in that state, at least insofar as the proceedings *in personam* seek to enforce causes of action relating to those very activities or to other activities within the state." *Id.* at 445-446.

It should be noted that in *Perkins* the defendant corporation maintained an office, stationed employees, dispatched funds, paid salaries, had bank accounts, and held meetings all within the jurisdiction. By contrast, as the District Court found, Crang had "no office, bank accounts, telephone listings, subsidiaries or affiliates in the United States [nor] did it have salesmen in the United States." (63A-64A, 153A, 272A). As this Court recognized in *Leasco v. Maxwell*, *supra*, when a defendant's activities are so insignificant that they can be characterized as *de minimis*, a failure to terminate a business entity by means of a formal filing is completely immaterial.

In *Leasco*, one of the defendants was Chalmers Impey & Co. ("Chalmers Impey"), a British accounting firm. Chalmers Impey had no office in the United States, conducted no business there and performed no acts relating to the events at issue in the United States. Plaintiffs claimed that the formation of an accounting partnership in 1965 in New York by Chalmers Impey and a United States accounting firm provided a basis for the exercise of doing business jurisdiction. Plaintiffs argued that the partnership had not been formally dissolved until after the events giving rise to the complaint in 1969 and the filing of the amended complaint. In declining to find a basis for *in personam* jurisdiction, this Court found that Chalmers Impey's partnership had long since become dormant in fact. It rejected plaintiff's point that Chalmers Impey's failure to follow the legal niceties of partnership dissolution should subject it to *in personam* jurisdiction:

"[I]t is immaterial that the partnership was not formally dissolved until after the conduct here in question occurred and the amended complaint was filed. It is equally clear that Chalmers has done no act within the United States giving rise to the present cause of action." 468 F.2d at 1341.

When a defendant's activities are as *de minimis* as Crang's, it really makes no difference whether or not a registration lapsed or was formally withdrawn. It would offend traditional notions of fair play and substantial justice to base jurisdiction on the slender thread of registration. See *International Shoe Co. v. State of Washington, supra*, at 316. Plaintiff would have this Court's attention diverted from the fact that Crang had no "continuous and systematic activities" in the United States by its emphasis on Crang's prior registration. Yet Crang had ceased to do business here prior to even learning of a prospective underwriting of IOS stock in April 1969. The fact that it had not taken the formal act of terminating its registration with the SEC is irrelevant. Moreover, the corporation formed to carry on that business requested the SEC to permit it to withdraw its registration in May 1971 and that withdrawal was permitted. Thus, it is "immaterial that the [registration] was not formally [withdrawn] until after the conduct here in question occurred and the . . . complaint was filed." *Leasco v. Maxwell, supra*, at 1341.

Plaintiff's second contention that Howe came to New York "on business four or five times" exaggerates the facts established in the record. As noted, Howe was in New York only three times in 1969\*; on one day he visited

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\* In an effort to shore up the lack of Crang's contacts with this forum, plaintiff frequently ignores vital factual distinctions between the conduct of the various co-defendants. Of the 70 acts of defendants cited by plaintiff in his brief on subject matter jurisdiction, Docket No. 75-7055 (Br. 36-50), only 3 inconsequential meetings relate to Crang's presence in the United States. None of those meetings was with plaintiff or any member of his purported class and there is no allegation that any representations were made to any one at those meetings. They, therefore, do not constitute acts giving rise to the causes of action of plaintiff or any member of the class.

offices of four brokerage houses, ran into Cowett, president of IOS, and had breakfast with him the next morning; on another day he met Cowett for one hour for breakfast in New York and on a third day he visited New York to buy furniture for his wife. (62PA-63PA, 359PA-364PA, 10CA). This activity hardly constitutes "such a continuous and systematic course of 'doing business' . . . as to warrant a finding of its 'presence' in this jurisdiction." *Delagi v. Volkswagen A. G.*, 29 N.Y. 2d 426, 430-31 (1970); *Tauza v. Susquehanna Coal Co.*, *supra*. See Restatement (Second) of Conflict of Laws § 35 (1969).

Equally insufficient is plaintiff's argument that Howe's visits were intended to "drum up business" for Crang. (Br. at 17). As the record shows (80 PA, 13 CA), Howe, in his first visit to New York in April 1969, spent only one day calling on four brokerage houses which do business in Canada in the hope that they would shift some of that Canadian business to Crang. Those calls, never again repeated, hardly constitute a regular course of soliciting business here, particularly where the business to be performed would take place entirely in Canada.

Plaintiff's third claim that "[from] 1969 to 1971, commissions earned by Crang on United States business totalled approximately \$50,000 (15-18 PA)" is without merit (Br. 17). The record shows exactly the contrary. Two schedules prepared by Crang and cited by plaintiff at 15 PA and 16 PA plainly show (i) gross commissions of \$835,794.40 earned by Crang on sales in Canada over Canadian exchanges for United States residents (Schedule A), and (ii) gross commissions of \$11,166.58 relating to transactions it placed with United States brokers for execution in the United States on which Crang was charged the full commission rate and on which Crang earned no commissions. As noted, these "services" were performed merely to ac-

commodate its customers and Crang neither charged nor received any commissions pursuant to those transactions. (15PA-17PA, 64A). As this Court observed in *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205 (2d Cir. 1970), where a New York company performs only ministerial acts in New York for a foreign domiciliary, those acts do not subject the foreign domiciliary to the jurisdiction of the New York courts.

Moreover, the fact that Crang buys and sells United States securities in Canada is irrelevant to the jurisdictional issue. If the rule were otherwise, any brokerage house of any size anywhere in the world would be subject to suit here on any cause of action and as a result, United States corporations would find themselves unable to market their securities abroad. Such far-reaching consequences were not contemplated by the securities laws and cannot be tolerated under concepts of due process.

Plaintiff's final argument that certain United States residents may have sold stock in the Canadian underwriting also falls short of a threshold jurisdictional showing. The underwriting agreement between Crang and the selling shareholders was negotiated and signed in Switzerland and Canada, and payment for the shares was made to Cowett in London. (346 PA-347 PA). There is no evidence that Cowett distributed any of those proceeds in the United States. It is believed that those proceeds were delivered by Cowett to Investors Overseas Bank, Luxembourg, for the account of the sellers. Crang, however, played no role in the distribution of the proceeds and has no knowledge of what happened to the proceeds after it delivered them to Cowett in London, England. (346 PA-347 PA). Applying the rule of *Leasco, supra*, at 1340, 1342, a foreigner who deals with Americans abroad has not thereby subjected himself to personal jurisdiction in the United States.

Thus, plaintiff fails to demonstrate that Crang did sufficient business in the United States either in September 1969 when the foreign underwriting occurred or in January 1972 when Howe was served in Canada, so as to subject it to jurisdiction of the United States courts.\* The only evidence of Crang's "presence" or "doing business" is (1) a lapsed registration not formally withdrawn when Crang closed its branch office in New York on April 1, 1969; (2) three one-day trips by Howe in 1969 and (3) Howe's statement that on one of those trips he called on four United States brokers who did business in Canada. Neither separately nor taken together do these *de minimis* acts constitute the substantial "permanence and continuity" required by the Restatement (Second) of Conflict of Laws § 35 (1969) to sustain personal jurisdiction over Crang.

**B. Crang Performed No Acts in the United States Which Subject it to Jurisdiction Here.**

The District Court found that Crang's *de minimis* acts within the United States "can hardly be considered acts out of which [plaintiff's] cause of action arose." (273A). Juxtaposing the allegations of the complaint and the facts as to Crang, the District Court observed:

"There has been no showing that the [these *de minimis* preliminary discussions] were related to the alleged misleading statements and omissions

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\* Plaintiff attempts to escape that conclusion by citing a variety of cases, including *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957), involving actions maintained by an insured against his insurer to enforce a policy in a forum where the insurer mailed the policy and the insured resided. Those cases all involve personal jurisdiction on the basis of a cause of action arising from an act in the state. In each case jurisdiction was upheld on that basis and not under the "doing business" test which applies to personal jurisdiction for any cause of action.

in the prospectuses. Moreover, plaintiff's purchase of I.O.S. shares does not appear to have been made in reliance on statements in the Crang prospectus, since that prospectus was sent to the United States after the date of the purchase. The evidence reveals that Crang investigated I.O.S.'s affairs and prepared the prospectus in Canada, Switzerland and France. It accepted orders for I.O.S. stock in Toronto and sold shares only outside the United States and only to non-Americans." (275A).

The District Court properly ruled that the acts of a foreign entity in the United States must give rise to the cause of action alleged in order to sustain personal jurisdiction. Sections 35 and 36 of the Restatement (Second) of Conflict of Laws (1969), cited by plaintiff, expressly state that requirement, as has every case considering the issue. See e.g., *McGee v. International Life Insurance Co.*, *supra*; *International Shoe Co. v. State of Washington*, *supra*, at 320; *Leasco v. Maxwell*, *supra*; *Frummer v. Hilton Hotels International, Inc.*, 9 N.Y. 2d 533 (1967); see also New York Civil Practice Law and Rules §§ 302(a)(1) and 302(a)(2) (McKinney 1972).

Howe's brief meetings with Cowett in the United States did not give rise to plaintiff's cause of action. The complaint charges that each of the three prospectuses contained allegedly misleading IOS financial statements, failed to disclose the true purpose of the use of the proceeds and failed to state that IOS was allegedly trading illegally in gold. Unrelated to these allegations are Crang's three visits to the United States which took place two and four months prior to the underwriting. Those two meetings were preliminary and, more conclusively, Crang never dealt with the plaintiff or any member of the class in those meetings nor at any other time. Finally, the record shows, as noted

by the District Court, that plaintiff's argument that he relied on the Crang prospectus before he purchased his stock is unsubstantiated. (273A).\*

Thus, plaintiff cannot prove that Crang did anything in the United States which gave rise to the allegedly fraudulent sale of stock or to plaintiff's damage. It is determinative (i) that Crang never dealt with plaintiff or any member of the purported class in the United States, (ii) that Crang never sold any IOS shares in the United States, (iii) that Crang took elaborate precautions to preclude the purchase by any United States citizen of IOS shares from Crang, (iv) that there is no evidence of any such purchase, (v) that plaintiff could not have relied on the Crang prospectus, and (vi) that there were no misrepresentations or any other acts in the United States by Crang from which plaintiff's complaint could be said to have arisen.

These facts preclude finding that the cause of action arose in tort from any act in New York. As stated by the New York Court of Appeals in *Frummer v. Hilton Hotels International, Inc.*, *supra*, at 536:

"However, the plaintiff does not allege that he had any dealings at all with the British corporate defendant or its agents in this State. Therefore, it may not be said that his cause of action *arose* from the British corporation's transaction of any business here . . ." (emphasis in original).

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\* Plaintiff renews his claim that the date of mailing is disputed. (Br. at 24). It is not. The record shows that plaintiff sent in his check on December 3, 1969 to pay for his IOS shares; in the record the only reference to the date of mailing shows that the Crang prospectus was mailed after September 24, 1969.

Plaintiff's cause of action against Crang, if extant, is grounded on sales by Crang in Canada to Canadians pursuant to a prospectus prepared in Canada and Geneva.\*

**C. Plaintiff Has Had Sufficient Discovery on the Jurisdictional Issue.**

Plaintiff acknowledges the inadequacy of the jurisdictional facts as to Crang by his claim that he only has to establish "threshold jurisdiction" at this stage. Plaintiff thus suggests that he is entitled to further discovery on this issue.\*\* This tactic of delay expressly contradicts the parties' agreement that they would submit to full discovery on the jurisdictional issues and, upon completion, the defendants would make their jurisdictional motions. (85A-92A, 7CA-9CA). Thus, the parties guaranteed that a full record would be before the District Court while the jurisdictional motions were pending.

Plaintiff has had over a year to complete such discovery and in his papers in opposition to Andersen's motion for certification of its appeal represented to this Court that discovery is "virtually completed." (Br. of Appellant Andersen at 7). He is not entitled to yet another bite of the apple. In *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), affirming the District Court's grant

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\* Plaintiff does not contend that the District Court erroneously rejected his argument that Crang should have foreseen a substantial and direct effect here from its acts abroad. In view of Crang's successful efforts to prevent sales here, such a finding is warranted. Moreover, any implication that the acts of others could be used to obtain personal jurisdiction over Crang is contrary to the established laws of this Circuit. *Leasco v. Maxwell*, *supra*, at 1343; *H. L. Moore Drug Exchange Inc. v. Smith, Kline & French Laboratories*, 384 F.2d 97, 98 (2d Cir. 1967); *Bertha Building Corp. v. National Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958).

\*\* Plaintiff does not state what additional discovery would show.

of a preliminary injunction without an evidentiary hearing, this Court chastised a party for similarly reneging on its prior commitment:

"... Ford joined the battle of affidavits with as much relish as the plaintiffs. A party who chooses to gamble on that procedure cannot be heard to complain of it when the decision is adverse." 429 F.2d at 1205.

## POINT II

**This Court lacks jurisdiction over the subject matter of this action with respect to Crang and over the claims of Canadians who purchased stock from Crang.**

**A. The Securities Acts Do Not Confer Jurisdiction Over the Claims of Foreigners Who Purchased IOS Stock.**

The District Court commingled the purchasers of each of the three public offerings and refused to consider that the individual claims of each class plaintiff purports to represent are separately cognizable under subject matter jurisdiction. The three claims erroneously grouped were: the claims of Canadians who purchased IOS stock in Canada in the Canadian underwriting, the claims of Europeans, Africans and Asians who purchased IOS stock in the Drexel underwriting and the claims of IOS insiders who purchased IOS stock in the IOB underwriting, thirty-seven of whom were possibly American residents.\* The District Court justified

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\* As Andersen notes (Br. of Appellant Andersen at 22), it is likely that many of those purchasers whose addresses were stated in December 1970 to be in the United States, may have returned to the United States after the fall of IOS. Only Bersch has been shown definitely to have a United States residence.

its treatment by relying on (1) preliminary discussions in the United States concerning the three offerings and IOS's operations,\* and (2) the hypothetical impact of the fall of IOS on the American securities market and the consequence that Bersch, an American, was allegedly injured.

The District Court's refusal to consider the varieties of claims and the peculiarities attributable to each was error; each individual claim in a class action must fall within the subject matter jurisdiction of the District Court or be dismissed. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969); *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964); *Bailey v. Patterson*, 369 U.S. 31 (1962); *Alvarez v. Pan American Life Insurance Company*, 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 387 U.S. 827 (1969); *Buckingham v. Lord*, 326 F.Supp. 218 (D.C. Mont. 1971); *Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Inc.*, 317 F.Supp. 1022 (E.D. Pa. 1970); *Goodman v. H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

In *Zahn*, *supra*, the Supreme Court held that the District Court may proceed only with respect to claims over which it has jurisdiction. Those claims which do not fall within that jurisdiction must be dismissed.\*\* As this Court

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\* As noted, Crang was never a party to these discussions and was never informed that Price Waterhouse was engaged. (354PA-355PA, 359PA, 376PA-378PA).

\*\* That *Zahn* held that each class member must present a claim over which the District Court has jurisdiction to adjudicate, is best shown by Justice Brennan's dissent. Justice Brennan criticizes the Court for refusing to entertain claims by separate class members which are not within the subject matter jurisdiction of the District Court to be adjudicated as "ancillary" to those over which the Court

(footnotes continued on following page)

in *Zahn* stated, 469 F.2d at 1035, and as the Supreme Court repeated, 414 U.S. at 301, "one plaintiff may not ride in on another's coattails."

The holding in *Zahn* was premised on the failure to meet the jurisdictional amount required by 28 U.S.C. § 1331 (1966).<sup>\*</sup> However the principle is equally applicable where subject matter jurisdiction is absent for other reasons.

No court which has considered this issue has adopted plaintiff's suggestion here—that federal question jurisdiction as to one plaintiff be expanded in a class action to vest jurisdiction over the claims of other class members that are beyond the jurisdictional reach of the federal statute.

Such a suggestion was rejected in *Goodman v. H. Hentz & Co.*, *supra*. In *Goodman*, plaintiffs brought an action pursuant to the Exchange Act and the Commodity Exchange Act, 7 U.S.C. § 2 (1974), against a broker. Plaintiffs asserted a claim based on trading in copper futures on behalf of a purported class member. As copper futures

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has jurisdiction. 414 U.S. at 309-12. Justice Brennan urged that the dissenting opinion by Judge Timbers of this Court be followed to expand the doctrine of trying ancillary claims related to the complaint but not within the subject matter jurisdiction of the Court. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). This expansion the majority in *Zahn* expressly refused to allow.

<sup>\*</sup> The claims by foreign purchasers of IOS stock do not satisfy the requisite jurisdictional amount in a diversity case. The three offerings, totalling \$100,000,000, plaintiff estimates were made to 25,000 people. (Bersch Subject Matter Jurisdiction Br. at 5). Thus, the maximum average claim is approximately \$4,400. Moreover, there is no diversity with respect to the claims of foreigners against Crang, also an alien. For diversity purposes, aliens are considered to be residents of a 51st State and are not diverse as to each other. See *e.g.*, *Kavourgias v. Nickolaou Co.*, 148 F.2d 96, 97 (9th Cir. 1945); *Ex parte Edelstein*, 30 F.2d 636, 638 (2d Cir. 1929); *Tsitsinakis v. Simpson, Spence & Young*, 90 F. Supp. 578, 579 (S.D.N.Y. 1950).

are not regulated by either Act, the Court held that plaintiff could not be part of the class, stating:

“Thus this plaintiff has alleged no facts which could bring the matters complained of within the scope of the act. . . . The class may contain others like [him], but *even if he is the only member over whom this Court lacks jurisdiction, a class action would not be proper. Any judgment for or against the class would not be binding upon him, since this Court has no jurisdiction over him.*” 265 F.Supp. at 443. (emphasis added).

In *Weaver v. United California Bank*, No. C-71-1738 SW (N.D. Cal., filed March 29, 1974),\* a class action complaint alleged that misrepresentations were made in connection with the sale of securities of a Swiss subsidiary of a California bank. The plaintiff purported to represent a class containing European investors. The Court held that the subject matter jurisdiction of the District Court would not be expanded to include the claims of the European investors where plaintiff could not show that those claims were embraced by the United States securities laws.

As to the Bersch complaint, the District Court's refusal to consider the circumstances of the individual claims and its concomitant assumption of jurisdiction over the subject matter of each of those claims has effectively put the United States in the unique position of regulating the securities industries of Canada, Europe and Asia. The United States' securities laws provide no such scope.

Guidance should have been taken from a recent Supreme Court decision, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506

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\* A true copy of the memorandum decision was presented to the District Court as Exhibit A to the affidavit of Leonard M. Marks, sworn to July 9, 1974. (Record 137).

(1974). There, the Supreme Court, in upholding an arbitration clause and dismissing the suit of an American company who claimed that a German seller of securities had violated Section 10(b) and Rule 10b-5, ruled:

“The only contact between the United States and the transaction involved here is the fact that Alberto-Culver is an American corporation and the occurrence of some—but by no means the greater part—of the pre-contract negotiations in this country. To determine that ‘American standards of fairness’ . . . must nonetheless govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries.” 417 U.S. 517 n. 11 (1974).

In full text, the Court reaffirmed its view that:

“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” *See id.* at 519.

**1. International Law Precludes the Application of the United States Securities Laws to the Canadian Underwriting.**

The District Court was presented with uncontradicted and documentary proof of the extensive Canadian regulation of the Crang offering including various preliminary criticisms of the Canadian securities commissions, all of which Crang was required to and did satisfy. (69A, 156A-158A, 379A, 368PA-369PA). Nevertheless, the District Court failed to even note the conflict of superimposing the United States securities laws on an underwriting and prospectus fully investigated, prepared and distributed solely in Canada and fully regulated by Canadian securities laws.

This failure was error. Where the application of United States law would subject a foreigner to United States regulation over foreign acts in addition to the regulation of his own nation, principles of international law require the subordination of United States law. Thus, where a Danish seaman, while temporarily in New York, joined the crew of a Danish ship and was injured abroad, the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953), held the Jones Act to be inapplicable, stating that "allowance of an additional remedy under our Jones Act would sharply conflict with the policy and letter of Danish law." Similarly, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), the Supreme Court held that the National Labor Relations Act did not apply to crews of a foreign ship even when the ship was in American waters, since the regulation to be imposed on those crews was best left to the home country. Likewise, the United States securities laws should not be applied to an offering of foreign securities to foreigners where, as in the Crang offering, another country has fully regulated the offering.\*

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\* Among the factors that any country must consider in defining the international scope of its securities regulation is the interest of others in regulating the offering. Note, *Conflict of Laws—Extraterritorial Applicability of the Securities Exchange Act of 1934—"Substantial Conduct" As a Determinative Basis of Jurisdiction to Adjudicate*, 20 Wayne L.Rev. 167, 170 (1973); Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 Ohio St. L.J. 586, 589-90 (1961). As one commentator has observed:

"Jurisdictional rules ordinarily presuppose, and are designed to ensure, not only that other concerned jurisdictions will not take serious offense at the assertion of jurisdiction in the original proceeding, but that they will not act affirmatively to frustrate the results reached in the original proceeding." Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1127 (1966).

Further, where the conduct abroad is already under the compulsion of foreign law, as in the instant case, imposition of dual American regulation is particularly unwarranted.\* This restraint is particularly apt in the securities area:

"As it becomes clear that the sole reason for extraterritorial application is the prevention of significant harm to American markets, other nations will be encouraged to develop—as many are already doing—their own regulatory systems, not in retribution, but as a protection for investors. Thus, the establishment of a *de facto* minimum standard of international regulation would be encouraged. As meaningful regulation by foreign countries increases, the necessity for protection through American regulation would decrease. The probabilities of substantial harm to American markets would be diminished by foreign regulation and the exemption [Section 30(b) of the Exchange Act] would find increased application." Bruen, *Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934*, 13 B.C. Ind. & Com. L. Rev. 955, 1255 (1972).

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\* Plaintiff cites, in support of his claim of jurisdiction, several antitrust cases: *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *U.S. v. Aluminum Co. of America*, 146 F.2d 416 (2d Cir. 1945); *U.S. v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962). However, a policy of broad jurisdictional reach in that sphere is inapplicable to the case at bar due to the fundamental difference between antitrust and securities regulation. It is considerably more plausible that a conspiracy to monopolize world markets would have the requisite "effect" on the American economy, whereas here, any injury from Crang's conduct is so remote that an impact, if any, on the American securities market was negligible.

For the foregoing reasons, such imposition of American regulation on a fully regulated offering in Canada can only engender international discord of the kind bitterly expressed by Canada in the now famous Watkins Report, *Task Force on the Structure of Canadian Industry, Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (1968).<sup>\*</sup> To avoid such international conflict, the rule of *Scherk, supra*, should be applied to reject the District Court's thesis that American law overrides the established laws of other sovereignties.

## 2. Crang Performed No Essential Acts in This Country.

This Court, in *Leasco v. Maxwell, supra*, held that before the federal securities laws can properly be applied to extraterritorial transactions, there must be a finding of conduct within the United States which amounts to an "essential link" to the cause of action. The Court closely examined the legislative history leading to the passage of § 10(b) of the Exchange Act and concluded that:

"[T]he language of § 10(b) of the Securities Exchange Act is much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security. When no fraud has been practiced in this country and the purchase or sale has not been made here, we would be hard pressed to find justification for going beyond *Schoenbaum*." 468 F.2d at 1334.

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<sup>\*</sup> Such discord was evidenced when the United States antitrust laws were applied to the conduct of a British firm in the case of *United States v. Imperial Chemical Industries Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952). In apparent retaliation, the British courts in *British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd.*, 1 Ch. 19 (1953) refused to grant comity to the United States judgment.

This "essential link" in *Leasco* consisted of repeated misrepresentations made by defendants in the United States. This Court prefaced its entire opinion by noting that its holding was based on plaintiff's allegations of such misrepresentations and thus the question of subject matter jurisdiction remained open pending proof of those misrepresentations and their significance at trial. Moreover, this Court in *Leasco* expressly distinguished the situation where all of the misrepresentations were made abroad but other conduct took place here. In that situation, the Court stated that the federal securities laws would not apply. 468 F.2d at 1337.

The District Court expressly refused to follow the plain language of *Leasco*. It termed defendant's interpretation of *Leasco* "myopic" and stated that this Court had held that any significant conduct in the territory would suffice. This was error. *Leasco* correctly emphasized the significance of the situs where the misrepresentations or inducements were made. It is the making of such inducements and the use of "manipulative devices" that Section 10(b) of the Exchange Act and Sections 17(a) and 12(2) of the Securities Act, cited by plaintiff, proscribe.

Restatement (Second) of Foreign Relations Law of the United States § 17 (1965), cited and relied on in *Leasco*, 468 F.2d at 1334, provides that "a state has jurisdiction to prescribe a rule of law attaching legal consequences to *conduct* that occurs within its territory." (emphasis added). This emphasis on United States contacts was followed in *Finch v. Marathon Securities Corp.*, 316 F. Supp. 1345 (S.D.N.Y. 1970). The transaction in question in *Finch* involved a number of contacts with the United States, including negotiations in New York, the signing of the purchase agreement in New York, use of the facilities of interstate commerce, a meeting with the

issuer's accountant in New York, the American citizenship of the officers and directors of one of the defendants, stock control of a defendant by an American corporation, retention of the foreign securities in New York, and the location in New York of administrative personnel. Notwithstanding those American contacts, the Court held that the substance of the alleged fraudulent activity took place outside the United States and, therefore, was not within the jurisdiction granted by the Exchange Act. 316 F. Supp. at 1349.

The significance of fraudulent conduct occurring in the United States was reinforced in *Travis v. Anthes Imperial Limited*, 473 F.2d 515 (8th Cir. 1973). There the Court held that "... subject matter jurisdiction attaches [under the Exchange Act] whenever there has been significant conduct *with respect to the alleged violations* in the United States." 473 F.2d at 524 (emphasis added). Plaintiff Bersch and the District Court erroneously interpreted this language to mean any significant conduct will suffice to permit subject matter jurisdiction. Their interpretation is belied by the express qualification of the Eighth Circuit that the conduct must be related to the alleged violation. In *Travis*, the acts cited by the Court as significant for subject matter jurisdiction were four allegedly fraudulent letters mailed to United States investors, several allegedly fraudulent telephone calls from the representative of those investors to defendant in Canada and a closing held in the United States. The conduct in *Travis* closely resembled the fraudulent scheme in *Leasco* involving two letters, several telephone calls, meetings and contract signing, all which occurred in the United States. This conduct in the United States led this Court in *Leasco* to find subject matter jurisdiction. Thus in *Travis*, as in *Leasco*, there was fraudulent conduct in the United States which violated Section 10(b) and Rule 10b-5.

Unlike *Travis* and *Leasco* the record below in this case was devoid of any showing by plaintiff that anyone in the United States received any representation or misrepresentation from Crang. For example, as previously noted, the District Court found that plaintiff did not have access to Crang's prospectus until after the offering and therefore necessarily concluded that Crang never made a representation in the United States upon which plaintiff relied. (273A).

As to the claims of the purchasers in the Canadian offering, there is no proof that any of those claims were based on misrepresentations or inducements made in the United States. Indeed, the District Court did not find that *any* of the elements of their claims occurred in the United States.\* The record shows that these claims bear totally foreign elements. The complaint charges Crang with material misrepresentations in its prospectus. The record shows that Crang investigated IOS in Geneva, Toronto and Ferney-Voltaire, France. (273A). The materiality of

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\* The elements of a cause of action under § 10(b) of the Exchange Act, Rule 10b-5 and Section 17(a) of the Securities Act are (1) a misrepresentation or omission of (2) a material fact (3) which the defendant knew or should have known to be false, (4) reliance by the plaintiff (in the case of an affirmative representation), (5) to his damage. *Cohn v. Franchard Corp.*, 478 F.2d 115 (2d Cir. 1973), *cert. denied*, 414 U.S. 857 (1973); *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965); *Smith v. Bear*, 237 F.2d 79 (2d Cir. 1956). To these § 12(2) of the Securities Act adds the requirement of privity. *DeMarco v. Edens*, 390 F.2d 836 (2d Cir. 1968).

Thus, each element of the cause of action by Canadian purchasers occurred outside the United States. Consequently, there was no element to which the United States securities laws could "attach," as is required by § 17 Restatement (Second) of Foreign

(footnote continued on following page)

any misrepresentations or omissions could have only been discovered abroad and it is the extent of Crang's diligence abroad that is at issue. Similarly, the reliance of those purchasers who bought shares in the Canadian underwriting occurred in Canada where they received the prospectus and presumably read it; their damage, if any, occurred in Canada. Therefore, the claims of Canadian purchasers lack the "essential link" to the United States required by this Court in *Leasco*.\*

The District Court's reliance on *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973) and *United*

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*Relations Law of the United States* (1965). Moreover, to base subject matter jurisdiction on conduct which does not amount to the elements of the cause of action directly violates Restatement (Second) of Conflict of Laws § 148 (1971). That section sets forth the choice-of-law considerations applicable to torts and lists the appropriate jurisdictional factors of a tort claim:

- "(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant."

With respect to those who purchased IOS stock in the Canadian underwriting, none of the jurisdictional factors listed by § 148 took place in the United States.

\* The claims of Europeans, Africans, Asians and the claims of the nonresident Americans who bought IOS stock abroad are also based on the prospectuses they received in their various countries. Their claims also lack the "essential link" of inducements in the United States.

*States v. Clark*, 359 F.Supp. 131 (S.D.N.Y. 1973) is also misplaced. *United Financial, supra*, involved an action brought by the SEC for appointment of a receiver and for an injunction. There the Court found sales to at least three Americans and held that those sales were sufficient to give the SEC power to invoke the federal securities laws to protect American investors. The Court did not hold that the presence of those three Americans gave jurisdiction over the claims of foreigners.

Similarly, in *United States v. Clark, supra*, the Court had subject matter jurisdiction over an indictment charging that the purpose of sales of securities of a Netherlands Antilles corporation was "part of a scheme to convey to the American investing public a false image about the soundness of the business and financial condition and prospects of Four Seasons, thus artificially inflating the price of Four Seasons stock" which, the Court said, presumably would be listed on the American Stock Exchange. 359 F.Supp. at 134. The Bersch complaint does not charge and the District Court did not find such an artificial device involved in the IOS offering, nor could such a finding be made as IOS securities were never listed on any American exchange.

Finally, it makes sense to focus jurisdiction on the place where the inducements were made or where the purchase and sale occurred. Such a focus permits certainty in an area where precise rules are needed. The District Court's test which required the accumulation of many acts, each of minimal significance to add up to a "significant" total is unworkable and devoid of guidance. Sound public policy requires that underwriters be able to know under prescribed standards when they have to register offerings. If a purpose of law is to furnish such standards, the District Court's test fails.

**B. The Canadian Offering Had No Detrimental Impact Within the United States and Does Not Warrant the Extraterritorial Extension of American Securities Laws.**

Plaintiff was not only unable to show any significant conduct by Crang in this jurisdiction, but also failed to prove that Crang's conduct abroad caused any effects within the United States which occurred as a "direct and foreseeable result" of the alleged wrong to plaintiff. *Leasco v. Maxwell, supra*; Restatement (Second) of Foreign Relations Law of the United States § 18 (1965). Plaintiff's hypothesis that the "collapse of IOS soured foreign investors and discouraged their investment in American securities" resulting in a "loss of investor confidence" in the general reputation of the United States securities markets (Bersch Br. on Subject Matter Jurisdiction, at 61, 68) is unsubstantiated by any proof in the record.

The District Court conceded that "proof of a clear correlation between the failure of the I.O.S. offering and the above-mentioned results is difficult to document." (269A). Nonetheless, it ruled that "some credence must be given to the general proposition that a collapse of a public offering by a company whose subsidiaries trade and hold massive amounts of American securities would have a negative impact on the American market." (269A). This general hypothesis, however, contradicts the SEC's report to Congress that the fall of IOS had, at most, a minimal impact on the United States securities markets. Institutional Investors Study Report, Vol. 3, H. R. Doc. No. 64, 92d Cong., 1st Sess., Pt. 3, p. 947 (1971).

The District Court's rationale that subject matter jurisdiction is warranted whenever fraudulent foreign transac-

tions would impair the value of American investments was rejected by this Court in *Leasco v. Maxwell*, *supra*:

"If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether . . . § 10(b) would be applicable simply because of the adverse effect [in the United States] of the fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders." 468 F.2d at 1334.

Plaintiff's claim of jurisdiction over Crang is based on an "adverse effect [in the United States] from fraudulently induced purchases [in Canada] of securities of a [Canadian] corporation not traded in an organized American securities market"—exactly the claim precluded by the Court in *Leasco*.

**C. Subject Matter Jurisdiction Cannot Be Supported By the Concept of "Integration" Coupled with Aiding and Abetting.**

The District Court's basic error in refusing to consider the variety of claims here led it to rely on its self-styled "thesis" of integrating the acts of the defendants. Jurisdiction was predicated on the holding that the three offerings "were so integrated as to have their prime movers collectively considered for purposes of subject matter jurisdiction." (259A). The errors concerning the formulation and application of that "thesis" are fully discussed in the Andersen, IOS and Cornfeld appellate briefs.

This "integration" holding is particularly unjustified with respect to Crang. The District Court found neither American investors purchasing in the Crang offering nor

significant conduct by Crang in the United States and, hence, a distinct absence of the "essential link" required by *Leasco v. Maxwell*, *supra*. Moreover, while relying on the similarities between the three offerings to justify the "integration" holding, the District Court gave little weight to its own findings that there were significant differences among the offerings. As argued by counsel for IOS, these "differences" were far more jurisdictionally significant than the purported similarities which the District Court admitted were "difficult to document." (IOS Brief at 47-49). The findings that each of the offerings were made to different groups of purchasers, that each underwriter was autonomous in its conduct of the underwriting, that the prospectuses were investigated and drafted separately and contained different texts, and that the Crang offering was fully regulated by the securities commissions of Canada all are evidence that the offerings were distinct and should be treated as such for jurisdictional purposes.\*

The District Court stated that the concept of "aiding and abetting" is "supportive of the integrated offering thesis", which concept it utilized for "collective consideration" of the defendants. (259A). The Court suggested that

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\* Plaintiff argues, and the District Court was persuaded, that since Howe suggested a need for a coordinating underwriter, (Bersch Br. on Subject Matter Jurisdiction, at 24-25), one can simply assume that such an underwriter existed. Yet there is no support in the record that a coordinating underwriter was designated and, in fact, none ever was appointed. The *sine qua non* of a thesis of integration is a managing or coordinating underwriter who conducts the bulk of the due diligence investigation; the other participating underwriters assume "a secondary and essentially passive role" and rely on the investigation of the managing underwriter. Freund & Hacker, *Cutting Up the Humble Pie: A Practical Approach to Apportioning Litigation Risks Among Underwriters*, 48 St. John's L. Rev. 461, 465, 467 (1974). As Crang's independence from the other underwriters has been amply demonstrated in this brief, any thesis of integration is factually inapposite.

the participants in the two exclusively foreign underwritings, Crang and IOB, actively aided and abetted or conspired with the Drexel group in a scheme to defraud in connection with the 1969 IOS public offering. However, no findings of fact were made which support the requisite elements of aiding and abetting under the securities laws.

Courts which have considered aiding and abetting in the context of the securities laws have referred to both the Restatement of Torts § 876 (1939) and the criminal law. The general rule is that secondary liability as an aider and abettor may be imposed if the following elements exist: (1) the person charged has actual knowledge of another's improper scheme, plus an intent to further that scheme; and (2) the person has given substantial assistance to the primary wrongdoer. *SEC v. Coffey* ['73-'74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,464 (6th Cir. March 28, 1974 at 95,634; *Rosen v. Dick, et al.* [Current] CCH Fed. Sec. L. Rep. ¶ 94,786 (S.D.N.Y. September 3, 1974) at 96,604; *See e.g. Lanza v. Drexel & Co.*, 479 F.2d 1277, 1289, 1302-04 (2d Cir. 1973) (*en banc*); *Brennan v. Midwestern United Life Insurance Company*, 417 F.2d 147, 154-55 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

Where it is urged that a defendant facilitated the fraud of another through inaction, a claim of aiding and abetting is made only on demonstrating:

- “(1) that the defendant had a duty of inquiry;
- (2) the plaintiff was a beneficiary of that duty of inquiry;
- (3) the defendant breached the duty of inquiry;
- (4) concomitant with the breach of duty of inquiry the defendant breached a duty of disclosure; and
- (5) there is a causal connection between the breach of duty of inquiry and disclosure and the facilitation of the underlying fraud; that is, adequate inquiry and subsequent disclosure would

have led to the discovery of the underlying fraud or its prevention." *Hochfelder v. Ernst & Ernst*, [Current] CCH Fed. Sec. L. Rep. ¶ 94,781 (7th Cir. August 30, 1974) at 96,579.

Plaintiff's complaint does not specify the relative degree of contribution each defendant made to the alleged primary fraud in the United States. Instead, it only states that the "participating underwriters" aided and abetted IOS and Cornfeld in the illegal scheme to defraud. (17A). Crang played no role in the IOS offering in the United States. (275A).

Such an indiscriminate use of the aiding and abetting theory was criticized in one of the two cases, *SEC v. National Bankers Life Insurance Co.*, 324 F.Supp. 189 (N. D. Tex.) *aff'd*, 448 F.2d 652 (5th Cir. 1971), cited by the District Court below:

"It is always possible in a complex law suit that a party may become unable to see the forest for the trees. That appears to be the situation in the instant case with the SEC. The SEC has brought suit against a number of defendants that allegedly committed a wide variety of acts. The SEC has sought to paint them all with the same broad brush—claiming that the various activities have made each defendant part of a conspiracy to sell unregistered stock and part of a scheme to defraud. Because of this alleged combined activity, the SEC sought to hold them all jointly liable. In so doing, the SEC, however, failed to distinguish one defendant from the other and failed to properly delineate individual violations." 324 F. Supp. 197.

*See also* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy In Pari*

*Delicto, Indemnification and Contribution*, 120 U. Pa. L. Rev. 597 (1972).

Plaintiff has not alleged facts as to Crang's liability as an aider and abettor because none exist. There is no evidence that Crang knowingly assisted the alleged primary wrongdoers, the Drexel Group, in any of their fraud. In this regard, the record shows that Crang never discussed the Canadian prospectus or the Drexel prospectus with any member of the Drexel Group. (354PA, 355PA, 359PA, 376PA, 378PA). As the three offering prospectuses were drafted separately and without collaboration, no showing can be made that Crang knew that the Drexel prospectus would allegedly be misleading. (350PA, 358PA).

Inaction may be a form of assistance in certain cases, but only where it is shown that the silence of the accused aider and abettor was consciously intended to aid the securities law violation. *Wessel v. Buhler*, 437 F.2d 279, 283 (9th Cir. 1971); *SEC v. National Bankers Life Insurance Co.*, *supra*; *Brennan v. Midwestern United Life Insurance Co.*, *supra*; *Timetrust, Inc. v. SEC*, 142 F.2d 744, 745-46 (9th Cir. 1944); *Fischer v. Kletz*, 266 F. Supp. 180, 195-96 (S.D.N.Y. 1967).

The rationale for the rule that a securities law violation must be proven by reliable and probable evidence was explained in *SEC v. Coffey*, *supra*, at 95,635:

"Were such *proof* not required, a person who is not primarily liable for a violation could yet be held personally liable for violation, even though he or she was unaware of the need to disclose information withheld by those primarily liable. *The result would be to impose liability for an innocent omission, for non-culpable inaction.* This would stretch the application of Rule 10b-5 beyond its statutory limits,

since section 10b of the 1934 Act does not impose liability for innocent acts but only for acts of fraud or deceit." [footnotes omitted] (emphasis added).

This analysis leads to the conclusion that the aiding and abetting concept cannot be used to anchor a finding of liability to Crang under the "integrated offering" concept. Unable to find the requisite aiding and abetting elements to support the assertion of jurisdiction over Crang, the District Court should have dismissed Crang from the action.

**D. The District Court Erroneously Denied Crang's Claim for Section 30(b) Exemption.**

The District Court improperly held that Section 30(b) of the Exchange Act does not exempt a foreign broker dealer such as Crang who never engaged in any fraudulent conduct in the United States nor committed any acts outside the United States which had significant foreseeable effects within the United States. (271A). As the District Court specifically ruled that Crang had no significant conduct within the United States (273A, 275A) nor conduct abroad which had an impact upon the United States securities markets (275A), Crang's activities fall squarely within the exemption of Section 30(b).

Section 30(b) exempts from the provisions of the Exchange Act "any person insofar as he transacts a business in securities without the jurisdiction of the United States." There is no doubt that Crang transacts a business in securities in Canada. Crang is a Canadian broker dealer licensed to sell and underwrite securities in Canada. (63A, 272A). At the time of the offering and at the initiation of this action, Crang did not conduct a business in securities within the United States. (63A-64A, 153A, 272A, 2CA). Its role

in the IOS underwriting in 1969 was part of Crang's business in securities outside the jurisdiction of the United States.

The Section 30(b) exemption from Exchange Act liability can only be destroyed by *substantial* acts within the United States. *Kook v. Crang*, 182 F.Supp. 388 (S.D. N.Y. 1960). In that case the Court stated:

"The question here is not whether there are contacts with the United States sufficient to give this Court jurisdiction, no one questions that, but rather whether Congress intended to make the statute applicable to these transactions. We hold that such was not the intention of the legislature and that 'jurisdiction' as used in Section 30(b) contemplates some necessary and substantial act within the United States." 182 F. Supp. at 390-91.

The policy embodied in Section 30(b) is the right of foreign securities houses to conduct business in securities outside the United States without being saddled with regulation by this country. As stated by this Court in *Schoenbaum v. Firstbrook*, *supra*,

"The purpose of this subsection is to permit persons in the securities business to conduct transactions in securities outside the United States without complying with the burdensome reporting requirement of the Act and without being subject to its regulatory provisions, except insofar as the Commission finds it necessary and appropriate to regulate such transactions to prevent evasion of the Act." 405 F.2d at 207

The same policy of exempting foreign brokerage houses from the provisions of the Exchange Act precludes regulation if the activities of those transacting a business are with-

out the United States. *Sinva Inc. v. Meilach, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385 (S.D.N.Y. 1969). In allowing an exemption for a foreign broker who offered foreign securities exclusively for sale to foreigners, the Court in *Sinva, supra* held:

“As to plaintiff’s second ground, the claims under the Securities Act were properly dismissed. There was not the slightest evidence that any of the . . . transactions in issue were executed on any exchange in the United States. Rather, the transactions were between foreigners, were made in France or in Italy and were executed on the London Exchange. The Securities Act was therefore inapplicable.”  
[footnote omitted] 48 F.R.D. at 386.

Thus, Crang, a foreign broker dealer which transacts business in securities outside the United States, is exempt from the provisions of the Exchange Act by Section 30(b), and its participation in the Crang offering which the District Court found was exclusively foreign, does not allow a finding of “substantial acts” sufficient to deprive Crang of its Section 30(b) exemption.

# CONCLUSION

The order of the District Court dismissing J. H. Crang & Co. from the action for lack of *in personam* should be affirmed. The order of the District Court denying the motion to dismiss the claims of Canadian purchasers and the complaint as to J. H. Crang & Co. for lack of subject matter jurisdiction should be reversed.

Respectfully submitted,

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PAULA J. MUELLER

*of Counsel*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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HOWARD BERSCH, :

Plaintiff-Appellant, :

Docket No. 75-7031

v. :

DREXEL FIRESTONE, INCORPORATED, :  
DREXEL HARRIMAN RIPLEY, BANQUE :  
ROTHSCHILD, HILL SAMUEL & COMPANY, :  
LIMITED, GUINNESS MAHON & CO., :  
LIMITED, PIERSON, HELDRING & :  
PIERSON, SMITH BARNEY & CO. :  
INCORPORATED, INVESTORS OVERSEAS :  
BANK, LIMITED, ARTHUR ANDERSEN :  
& CO., I.O.S., LTD. and BERNARD :  
CORNFELD, :

Defendants, :

J. H. CRANG & CO., :

Defendant-Appellee. :

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The undersigned, a member of the Bar of this Court,  
hereby certifies that true copies of Appellee's Brief have  
been duly served, by hand delivery on counsel for all parties  
who have appeared in the above actions, on the 28th day of  
February, 1975.

Howard C. Buschman  
Howard C. Buschman

Dated: February 28, 1975

Sir:

Take notice that the within is a copy of  
.....  
which was duly made, entered and filed in the  
office of the Clerk of the.....  
.....on the .....  
day of.....19.....  
Dated, New York, N. Y. ....19.....  
Yours, etc.,

**WILLKIE FARR & GALLAGHER**  
Attorneys for .....  
Office and Post Office Address  
1 Chase Manhattan Plaza  
New York, N. Y. 10005

To:

Sir.

Take notice that the within  
.....  
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at.....Term, Part.....  
of the.....Court at the  
.....Court House, in the  
.....of ....., County of  
.....on the .....day of  
.....19....., at.....  
o'clock.....M.  
Dated New York, N. Y. ...., 19.....  
Yours, etc.,

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To:

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HOWARD BERSCH,  
Plaintiff- Appellant,

v.

DREXEL FIRESTONE, INCORPORATED,  
et al,

Defendants,

J. H. CRANG & CO.,

Defendant-Appellee

CERTIFICATE OF SERVICE

**WILLKIE FARR & GALLAGHER**

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Due and sufficient service of the within

is hereby admitted.

Dated New York, N.Y. ....19

Attorneys for